SUPREME COURT, U. S.

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No. 313

In the Supreme Court of the United States

OCTOBER TERM, 1969

DONALD KALISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are adequately set forth in the petition.

QUESTION PRESENTED

Whether petitioner is entitled to a refund of federal excise taxes paid on telephone service, on the ground that the taxing statute is invalid because the revenue collected under it might be appropriated by Congress to carry on an allegedly unconstitutional "war in Vietnam."

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 4251 [as amended by Sec. 302 of the Excise Tax Reduction Act of 1965, P.L. 89-44, 79 Stat. 136, 145, and Sec. 202(a) of the Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38, 66].

IMPOSITION OF TAX.

(a) *In General.*—

(1) Except as provided in subsection (b), there is hereby imposed on amounts paid for the following communication services a tax equal to the percent of the amount so paid specified in paragraph (2):

Local telephone service.
Toll telephone service.
Teletypewriter exchange service.

The taxes imposed by this section shall be paid by the person paying for the services.

(2) The rate of tax referred to in paragraph (1) is as follows:

Amounts paid pursuant to bills first rendered—

	Percent [1]
Before April 1, 1968	10
After March 31, 1968, and before January 1, 1969	1

[1] Prior to the enactment of Section 202(a) of the Tax Adjustment Act of 1966, Section 4251 provided for the following rates:

During 1966	3 percent
During 1967	2 percent
During 1968	1 percent

(b) *Termination of Tax.*—The tax imposed by subsection (a) shall not apply to amounts paid pursuant to bills first rendered on or after January 1, 1969.

(c) *Special Rule.*—For purposes of subsection (a), in the case of communications services rendered before February 1, 1968, for which a bill has not been rendered before April 1, 1968, a bill shall be treated as having been first rendered on March 31, 1968. For purposes of subsections (a) and (b), in the case of communications services rendered after January 31, 1968, and before November 1, 1968, for which a bill has not been rendered before January 1, 1969, a bill shall be treated as having been first rendered on December 31, 1968.

[26 U.S.C. (Supp. II) 4251.]

STATEMENT

The facts are fully set forth in the complaint filed in the District Court for the Central District of California (Pet. App. 1-5); in summary, they are as follows:

On September 14, 1967, petitioner paid to General Telephone Company, as collecting agency, the sum of $6.15 in federal excise taxes on telephone service for August 1967, and on September 20, 1967, General Telephone paid the tax over to the United States. (Pet. App. 1.) On September 21, 1967, petitioner filed a claim for refund in the amount of $4.92, alleging that such amount represented the taxes imposed under Section 202(a) of the Tax Adjustment Act of 1966, which postponed a rate reduction from

the 10 percent rate for excise taxes on telephone service. Petitioner claimed that the proper rate was 2 percent, alleging that the statute postponing the rate reduction was unconstitutional because it imposed a tax for "the sole purpose" of providing "funds for the war in Vietnam" and the "action of the Government in carrying on the said war is in violation of the Constitution of the United States." (Pet. App. 2.) On January 18, 1968, petitioner's refund claim was denied. (Pet. App. 3.)

Petitioner thereupon filed a complaint (Pet. App. 1-5) in the district court for a refund, alleging the same grounds as in his refund claim. Upon motion by the United States, the district court dismissed the complaint. (Pet. App. 7.) The Court of Appeals for the Ninth Circuit affirmed *per curiam* the action of the district court. (Pet. App. 8-9.)

ARGUMENT

The decision below was correct, and there is no conflict of decisions or other reason for review by this Court.

1. Petitioner, using the vehicle of a tax refund suit, is attempting to obtain a judicial inquiry into the propriety of the American involvement in Vietnam. In affirming *per curiam* the action of the district court dismissing the complaint, the court of appeals held (Pet. App. 9) that petitioner failed to state a claim upon which relief could be granted because the challenged excise tax statute was plainly valid on its face. As the courts below correctly rec-

ognized, petitioner's assertion (Pet. 5-6) that the "sole purpose" of the excise tax rate legislation was to defray costs in connection with the Vietnam effort is simply not borne out by the terms of the statute. Indeed, nothing whatever in Section 202(a) of the Tax Adjustment Act of 1966 binds Congress to appropriate the revenue in any particular manner. The funds derived from the tax are not held in any special fund, nor are they even traceable to or linked with any expenditure previously made or to be made. The statute therefore is no different from numerous provisions imposing excise, income, or other taxes. In alleging that the revenue raised under the statute was intended to defray costs relating to Vietnam, petitioner (Pet. 6) relies upon statements made in Congress which do not appear on the face of the legislation. This Court explicitly ruled in *United States* v. *O'Brien*, 391 U.S. 367, however, that otherwise valid legislation cannot be held unconstitutional because of such statements. There the Court invoked (391 U.S. at 383) the—

> familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. * * * [Quotation omitted.] This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona* v. *California*, 283 U.S. 423, 455 (1931).

Plainly, the Tax Adjustment Act of 1966 is not unconstitutional on its face and does not have any in-

evitable effect that would render it unconstitutional.[2] Accordingly, the courts below correctly held that petitioner failed to state a proper claim for relief.

2. As the citations at the conclusion of the court of appeals' opinion demonstrate, the basic question presented by petitioner—the legality of the American involvement in Vietnam—is a nonjusticiable political question. Petitioner is asking for judicial intervention in the Executive's conduct of foreign policy. But the final judgment and discretion in those matters are wholly confided to the Congress and the President by the Constitution, Article I, Section 8, and Article II, Sections 2 and 3, and cannot be considered by the courts. See, *e.g.*, *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302; *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 111; *Luftig* v. *McNamara*, 373 F. 2d 664, 665-666 (C.A. D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A. D.C.),

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[2] Petitioner's contention (Pet. 5-6) that the decision below is in conflict with *United States* v. *O'Brien*, *supra*, is therefore without merit. The fact that this Court included certain congressional committee reports as an appendix to its opinion does not diminish the thrust of its holding that otherwise valid legislation will not be voided on account of particular congressional motives. Moreover, neither *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, nor *Magnano Co.* v. *Hamilton*, 292 U.S. 40 (Pet. 5-6), support petitioner's contention. In *Cincinnati Soap Co.*, the Court did consider the use to be made of the revenue in connection with the validity of the tax, but there the statute expressly provided for a particular expenditure of the amounts collected. And in *Magnano Co.*, the Court observed (292 U.S., at 43) that the standard of "public purpose", applicable to state taxes, will not be deemed to have been disregarded because the legislature may have had an ulterior purpose in addition to the raising of revenue.

certiorari denied, 389 U.S. 934; *United States* v. *Hogans*, 369 F. 2d 359, 360 (C.A. 2);[3] *Farmer* v. *Rountree*, 252 F. 2d 490 (C.A. 6), certiorari denied, 357 U.S. 906. As this Court said in *Johnson* v. *Eisentrager*, 339 U.S. 763, 789—

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * *

See, also *Baker* v. *Carr*, 369 U.S. 186, 217, and *Powell* v. *McCormack*, decided June 16, 1969, No. 138, O.T., 1968, slip op. 30-31.

3. Apart from the facts that the instant case presents a non-justiciable political question, and that the complaint does not state a claim upon which relief could be granted, petitioner, as the court of appeals alternatively held (Pet. App. 8-9), was without the requisite standing to sue. We agree with petitioner's contention (Pet. 5) that he, as a taxpayer, has standing to recover a refund of taxes that he has paid. It is apparent, however, that this suit, nominally for a tax refund, is in substance a challenge to a federal expenditure of taxes collected. In *Flast* v. *Cohen*, 392 U.S. 83, 102, this Court stated that "in ruling on

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[3] In *Luftig* and *Mora*, the District of Columbia Circuit flatly rejected the notion that it might properly consider the validity of American actions in Vietnam in the context of a suit to enjoin officials from sending a member of the armed forces to Vietnam. The *Hogans* case involved a violation of the draft law.

standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." Thus, the Court concluded (392 U.S., pp. 102-103) that a federal taxpayer will not have standing to challenge a federal expenditure unless he can—

> show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. * * *

An examination of petitioner's complaint (Pet. App. 1-5) demonstrates beyond question that, as in *Massachusetts* v. *Mellon*, 262 U.S. 447, there was no allegation that Congress, in enacting the Tax Adjustment Act of 1966, "had breached a specific limitation upon its taxing and spending power." *Flast* v. *Cohen*, *supra*, pp. 104-105. To the contrary, the gravamen of petitioner's complaint is that federal funds are to be spent for an unlawful purpose in that such expenditures will exceed the powers of Congress under Article I, Section 8 of the Constitution. Accordingly, petitioner does not meet the standards enunciated by this Court in *Flast* v. *Cohen*, *supra*, for he has not alleged the violation of any specific constitutional limitation on the taxing power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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